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# In the Supreme Court of the United States

OCTOBER TERM, 1998

ELLIS E. NEDER, JR.,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

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**On Writ of Certiorari**
**To the United States Court of Appeals**
**For the Eleventh Circuit**

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## BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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LISA KEMLER
*Of Counsel*
National Association of
Criminal Defense Lawyers
108 North Alfred Street
Alexandria, VA 22314
(703) 684-8000

ROGER W. YOERGES
*Counsel of Record*
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
*Counsel for Amicus Curiae*
National Association of
Criminal Defense Lawyers

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## BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This *amicus curiae* brief is submitted on behalf of Petitioner, Ellis E. Neder, Jr. By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief.[1]

[1] As required by Rule 37.6 of this Court, *amicus curiae* submits the following: no party other than *amicus curiae* and its counsel authored this brief in whole or in part; no person or entity, other than *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

## INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and to ensure that criminal statutes are construed and applied in accordance with due process.

This brief addresses the first question on which the Court granted certiorari: whether the trial court's failure to instruct the jury on the materiality element in this case was harmless error where materiality was not in dispute at trial. The NACDL urges the Court to hold that constitutional errors that remove one or more of the elements of a criminal offense from the jury's consideration cannot be harmless. When the jury is not instructed that it must find all of the elements of a criminal offense beyond a reasonable doubt, the verdict it renders is necessarily defective, and its conviction cannot stand. Although the Court has suggested this result in its earlier decisions, it has never directly held that errors that have the effect of directing a verdict on an element of a criminal charge cannot be harmless. The NACDL advocates this position to preserve both the fundamental importance of the right to a trial by jury in our criminal justice system and the proper roles of the judge and jury within that system.



## SUMMARY OF ARGUMENT

Petitioner has a constitutional right to have a jury of his peers determine whether he is guilty of any crime on which he is tried. According to this Court's previous decisions, that right includes, as its central guarantee, the right to have the jury determine whether the prosecution has proved each of the elements of the criminal charges beyond a reasonable doubt. There is no doubt in this case that the jury did not determine the element of materiality with respect to Petitioner's tax fraud conviction. Instead, the trial court took it upon itself to find that Petitioner's statements were material, effectively directing a verdict against him on that essential element. In so doing, the trial court placed itself in the role of fact-finder, usurping the role of the jury and removing the protective barrier between the prosecutor and the criminally accused that the jury is intended to be.

The Eleventh Circuit's determination that this violation of Petitioner's Sixth Amendment and Due Process rights was harmless should be reversed. First, harmless error review is proper only when a jury renders a verdict of guilty based on factual findings on each and every element of the crime charged. Where a trial court in effect directs a verdict on any one of the elements of a crime, the jury has not rendered a constitutionally valid verdict to be reviewed for error, notwithstanding the jury's determination of guilt on the other elements of the crime charged. In this case, it indisputably was error for the trial judge to make his own findings on materiality, and that error affected not only how the jury reached its decision, but also what questions the jury actually decided. As a consequence, the jury found Petitioner guilty of tax fraud without even having addressed one of that crime's basic elements. That is not a verdict at all. Moreover, an appellate court reviewing the jury's findings cannot be allowed to manufacture a constitutionally sufficient verdict by

supplying its own findings on an element that the jury was instructed not to consider. This Court should hold that harmless error review is inapplicable where, as here, there is no verdict to review because the trial court's error prevented the jury from reaching a determination of guilt on each and every element of the offense.

Second, the Eleventh Circuit's decision should be reversed because the trial court's error in removing the element of materiality from the jury's consideration was a structural error under *Arizona v. Fulminante*, 499 U.S. 279 (1991), and is immune from harmless error analysis. *Fulminante* established that some constitutional errors affect such fundamental rights that they can never be harmless. The right to trial by jury is, and has been since the birth of this nation, the most scrupulously guarded right in our criminal justice system. Other rights, such as the right to be free from self-incrimination, the right to the assistance of counsel, the right to confront witnesses, and the right to have certain evidence excluded from trial, are important to our system of justice, but none equals the right to have a jury of one's peers, rather than the state or the judges it appoints, decide the fundamental question of an accused's guilt. The deprivation of this right, above all others, threatens the very structure of our system of justice and its underlying values. This Court has already recognized in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), that a constitutional error that results in a deficient jury verdict of guilt cannot be reviewed for harmless error. A constitutional error that removes one of the elements of the crime from the jury, no less than one that improperly instructs the jury on reasonable doubt, renders the trial fundamentally unfair and incapable of operating as a reliable vehicle for the determination of guilt and cannot be deemed harmless under any circumstance.



Third, to preserve the value of a criminal jury trial, this Court should articulate a bright line rule that harmless error review is inappropriate where a court has effectively directed a verdict of guilt on an element of a crime. If this Court allows appellate courts to uphold guilty verdicts rendered through the combination of findings by judges and juries merely because the appellate courts deem the evidence to have been "overwhelming" or because the defendant did not "dispute" the missing element, the right to a jury trial will be badly shaken. Criminal defendants dispute *all* the elements of the crime charged by pleading not guilty, and the prosecutor's burden is to establish each and every element beyond a reasonable doubt, whether the evidence is overwhelming or barely existent. Furthermore, if it is harmless error for the judge, rather than the jury, to decide one element of the crime, nothing logically would prevent convictions where the trial judge dispenses with the jury altogether and directs a verdict of guilt. This Court must make clear that our system of criminal justice is concerned with more than simply determining a defendant's innocence or guilt. The primary objective of our criminal justice system is to make these determinations fairly, justly, and within the bounds of the constitutional guarantees, among them the right to trial by jury, that serve to limit the power of the state over the individual.

## ARGUMENT

### I. WHEN A JUDGE TAKES AN ELEMENT OF A CRIME FROM THE JURY AND DIRECTS A VERDICT AS TO THAT ELEMENT, THERE IS NO CONSTITUTIONALLY ADEQUATE JURY VERDICT THAT AN APPELLATE COURT CAN REVIEW FOR HARMLESS ERROR.

#### A. Harmless Error Review Requires a Jury Verdict of Guilt Beyond a Reasonable Doubt as to Each and Every Element of the Offense Charged.

Harmless error review presumes that there is a constitutionally adequate verdict in the first instance to review. A constitutionally adequate verdict requires, at the very minimum, a jury's determination that the defendant is guilty beyond a reasonable doubt as to each and every element of the crime with which he is charged. *See United States v. Gaudin*, 515 U.S. 506, 522-23 (1995); *In re Winship*, 397 U.S. 358, 364 (1970). If there is no constitutionally adequate verdict, it follows that there is no verdict for an appellate court to review for harmless error. An appellate court faced with a deficient jury verdict of the kind found in this case therefore has only one option; it must reverse the defendant's conviction and remand the case to the trial court so that a jury can make a complete determination of the defendant's guilt.

This Court first endorsed harmless error review of constitutional errors in *Chapman v. California*, 386 U.S. 18 (1967), when it held that some errors

> are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.



*Id.* at 22. To declare a constitutional error harmless, however, the reviewing court must find beyond a reasonable doubt that the error did not contribute to the defendant's conviction. *See id.* at 23-24. Harmless error review does not turn on whether the jury reached the correct result or whether the jury would have reached the same result absent the error. *See Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

> [T]he question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision.

*Kotteakos v. United States*, 328 U.S. 750, 764 (1946). Any other inquiry would require the appellate court to hypothesize a guilty verdict that was never rendered, thus violating the Sixth Amendment guarantee of a trial by jury. *See Sullivan*, 508 U.S. at 279-80.

> The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.

*Id.* at 280.

Harmless error review therefore presumes that the jury actually found every fact necessary to support a conviction. In cases where the judge has instructed the jury not to make a finding as to one of the elements of the crime, however, that presumption plainly does not apply. If the jury failed to reach a verdict as to one of the elements of the crime charged, there is no actual verdict to review, *see id.* at 280, and there is no plausible way to determine whether a particular error did or did not substantially affect the verdict.

The case where a trial court removes an element of the crime from the jury, as the trial court did here, is fundamentally different from cases involving unconstitutional presumptions. Where a trial court instructs the jury that it must presume an element if it finds certain preliminary facts, or that it must presume an element unless it is rebutted by evidence from the defense, the jury is still typically instructed that it must find every element of the crime charged beyond a reasonable doubt. *See, e.g., Rose v. Clark*, 478 U.S. 570, 580-81 (1986). In many cases, finding the predicate facts necessary for applying the presumption also conclusively establishes the element, so that the jury, in finding the predicate facts, has effectively made a finding as to each element of the crime charged. *Id.* at 580-81. The jury may have applied the presumption in making its determination, but in choosing to apply the presumption, the jury nonetheless made a finding on each element of the crime. Where the jury's finding of predicate facts is tantamount to a finding on each element of the crime charged, the jury's reliance on an otherwise improper presumption does not so greatly undermine the jury's role in the criminal justice process that it demands automatic reversal. Indeed, in reaching this conclusion, the Court in *Rose* was careful to distinguish the use of a presumption from a situation where, as here, the jury was expressly told not to make a finding on each element of the crime charged. *Id.* at 580-81. In drawing this distinction, the Court necessarily recognized that only where there is a jury verdict on each element of the crime charged can there be a verdict that can be reviewed for harmless error



**B. Appellate Courts Cannot Salvage a Jury Verdict That Is Deficient Because the Jury Was Precluded From Deciding One of the Elements of the Crime.**

This Court has held repeatedly that appellate review cannot save a deficient jury verdict. If a jury has not reached a determination of all the factual issues necessary to support a conviction, an appellate court cannot supplement the jury's findings with factual findings of its own to create a constitutionally sufficient verdict of guilt. Harmless error review asks not "whether guilt may be spelt out of a record," but rather whether guilt has been properly found by the jury. *Bollenbach v. United States*, 326 U.S. 607, 614 (1946). This Court's previous decisions make clear that appellate courts reviewing constitutional errors for harmlessness should not "speculate upon probable reconviction" or about whether "conviction would, or might probably, have resulted in a properly conducted trial." *Kotteakos*, 328 U.S. at 763, 776. They are bound by what the jury actually did find and cannot hypothesize about what the jury might have found or would have found absent the error. This Court has been unmistakably clear that

> [f]indings made by a judge cannot cure deficiencies in the jury's finding as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime.

*Cabana v. Bullock*, 474 U.S. 376, 384-85 (1986), *overruled in part on different grounds by Pope v. Illinois*, 481 U.S. 497 (1987).

Appellate courts sometimes try to salvage inadequate verdicts by surmising that the jury may indeed have found facts related to the particular element, notwithstanding that it was instructed not to consider that element. This may be appropriate in the context where the error in question consists

of an impermissible presumption, but it is not appropriate where the trial judge has explicitly instructed the jury not to consider an element that he or she has determined to have been satisfied as a matter of law. Juries generally are instructed that they are bound to follow the judge's instructions as to the law, *see, e.g.*, 1 Edward J. Devitt et al., *Federal Jury Practice and Instructions* § 12.01 (4th ed. 1992) ("All of the instructions of law given to you by the Court . . . must guide and govern your deliberations."), and appellate courts are bound to presume that juries follow the instructions that they are given by the trial court. *City of Los Angeles v. Heller*, 475 U.S. 796, 798 (1986). Thus, where a trial court has instructed the jury not to consider an element of the crime because it is established as a matter of law, an appellate court reviewing the jury's verdict must presume that the jury followed these instructions.

> "The influence of the trial judge on the jury is necessarily and properly of great weight," and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word.

*Bollenbach*, 326 U.S. at 612 (quoting *Starr v. United States*, 153 U.S. 614, 626 (1894)). An appellate court cannot presume that a jury that was specifically instructed not to consider a certain element of a crime made independent findings as to that element in direct violation of the trial court's instructions.

> When . . . jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error.

*Griffin v. United States*, 502 U.S. 46, 59 (1991).



Where, as in this case, an element of the crime has been expressly removed from the jury's consideration, there is no way to conclude that guilt has been properly determined by the jury, and an appellate court that undertakes harmless error review is doing no more than spelling guilt out of the record and speculating as to whether the jury would have returned a verdict of guilt had it been given proper instructions. Under this Court's precedent, this is an improper role for an appellate court. Harmless error review is not appropriate where the jury has not determined all the necessary facts to support a conviction, and where a court -- trial or appellate -- has effectively directed a verdict on some element of the crime charged, the jury cannot be said to have determined all facts necessary to support a conviction.

## II. AN ERROR THAT REMOVES AN ELEMENT OF THE CRIME CHARGED FROM THE JURY'S DELIBERATIONS IS STRUCTURAL AND CANNOT BE REVIEWED FOR HARMLESS ERROR.

### A. Removing an Element From the Jury's Deliberations Is a Structural Error Under *Arizona v. Fulminante*.

Constitutional errors that affect the underlying structure of the trial process such that the trial cannot serve as a reliable means of determining the guilt or innocence of the accused defy harmless error review. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). The error in this case, which this Court has already held to be constitutional in nature, *see United States v. Gaudin*, 515 U.S. 506, 522-23 (1995), effectively deprived Petitioner of his right to a trial by jury because the jury did not make the ultimate determination of his guilt on all of the

elements of the crime of which he was convicted. This right undergirds the criminal trial process, and its deprivation constitutes a structural error that can never be deemed harmless.

In *Fulminante*, the Court divided the universe of constitutional errors into two groups, "structural errors," which are those that affect the framework within which the trial proceeds, and "trial errors," which are those that occur during the presentation of the case to the jury. 499 U.S. at 309-10. Trial errors can be reviewed for harmlessness, while structural errors, because of their very nature, must never be so reviewed. *Id.* Among those constitutional errors that this Court has held to be structural are the denial of the right to counsel at trial, *Gideon v. Wainwright*, 372 U.S. 335 (1963), the denial of the right to an unbiased judge, *Tumey v. Ohio*, 273 U.S. 510 (1927), the exclusion of members of the defendant's race from a grand jury, *Vasquez v. Hillery*, 474 U.S. 254 (1986), the denial of the right to self-representation at trial, *McKaskle v. Wiggins*, 465 U.S. 168 (1984), the denial of the right to a public trial, *Waller v. Georgia*, 467 U.S. 39 (1984), and the denial of the right to have the jury instructed on the reasonable doubt standard, *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

> Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.

*Rose v. Clark*, 478 U.S. 570, 577-78 (1986) (citation omitted).

Denying a defendant his right to have a jury deliberate on each and every element of the crime with which he is charged also should be included among those errors previously recognized as structural because such a denial goes to the



heart of the constitutional guarantee of a trial by jury, a guarantee that has historically occupied an exalted position in our criminal justice system. The jury is obviously part of the structure of a criminal trial; in fact, it is its nucleus. Depriving a criminal defendant of its protections is certainly structural error, which this Court has held can never be harmless.

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

*Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

"The right to have a jury make the ultimate determination of guilt has an impressive pedigree." *Gaudin*, 515 U.S. at 510 (citing 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769)).[2]

> When our more immediate ancestors removed to America, they brought this great privilege with them, as their birth-right and inheritance, as a part of that admirable common law, which had fenced round, and interposed barriers on every side against the approaches of arbitrary power.

Joseph Story, *Commentaries on the Constitution of the United States* § 923 (Ronald D. Rotunda & John E. Nowak eds., 1987). The right to trial by jury for the criminally accused became firmly established in the common law and was

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[2] For additional discussion about the use of juries throughout history, see Morris J. Bloomstein, *Verdict: The Jury System* (rev. ed. 1968); John Proffatt, *A Treatise on Trial By Jury* (1877). *See also* Harold M. Hyman & Catherine M. Tarrant, *Aspects of American Trial Jury History*, in *The Jury System in America* (Rita James Simon ed., 1975); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867 (1994).

regarded as "the grand bulwark of his liberties." 4 W. Blackstone, *Commentaries on the Laws of England* 342 (1769). The right was considered essential to freedom, and its denial was cause for great concern. Blackstone warned that

> inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread to the utter disuse of juries in questions of the most momentous concern.

*Id.* at 344.

> [B]y the time our Constitution was written, jury trial[s] in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta. Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689.

*Duncan v. Louisiana*, 391 U.S. 145, 151 (1968).

Our Constitution naturally reflects the fundamental importance of the jury to our system of justice. Indeed, at the Constitutional Convention, the importance of trial by jury was one of the few consistent points of agreement between the Federalists and the Anti-Federalists. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 871 (1994). Alexander Hamilton wrote in *The Federalist No. 83*:

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them, it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.



*The Federalist No. 83*, at 426 (Alexander Hamilton) (Max Beloff ed. 2d ed., 1987). The unanimous agreement as to the importance of trial by jury for the criminal defendant is illustrated by the fact that it is the only right to be expressly guaranteed both in the body of the Constitution itself, U.S. Const. art. III, § 2 ("[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury"), and in the Bill of Rights, U.S. Const. amend. VI ("[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury").

The Framers strove to protect the citizens from unchecked and arbitrary abuses of power by the government. They were aware that tyrannical governments used their power to institute criminal prosecutions to eliminate their political enemies and to control their subjects. The Framers therefore insisted on creating an independent judiciary and provided trial by jury as a further protection against the government.

> Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.

*Duncan*, 391 U.S. at 156.

The role of the jury in criminal cases has been guarded as carefully as the existence of the jury itself, since having a jury present during trial is of little value unless the jury has the actual power to stand between the accused and the state. As a result, the boundary between the respective roles of the judge and jury in a criminal trial has been scrupulously guarded throughout history. "Where the judges have usurped the province of the jury in other countries, the jury has been undermined, and abolished in the end." John Proffatt, *A Treatise on Trial By Jury* § 306a, at 373-74 (1877). While

the precise location of the boundary between judge and jury has shifted somewhat throughout our history, the need for maintaining that boundary has been consistently recognized.

> The line between the duties of a court and jury . . . is perfectly well defined; and the rigid observance of it is of the last importance to the administration of systematic justice. . . . In this way, court and jury are made responsible, each in its appropriate department, for the part taken by each . . . and in this way alone can errors of fact and errors of law be traced . . . to their proper sources.

*Sparf v. United States*, 156 U.S. 51, 84 (1895) (quoting *State v. Smith*, 6 R.I. 33, 34 (1859)). This Court has stated that,

> [u]pon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be.

*Sparf*, 156 U.S. at 102.

> In this separation of the functions of court and jury is found the chief value, as well as safety, of the jury system. Those functions cannot be confounded or disregarded without endangering the stability of public justice, as well as the security of private and personal rights.

*Id.* at 106.

The Framers felt that ensuring community participation in the determination of the guilt of the criminally accused provided a check against the law enforcement powers of the executive. To that end, juries do not simply render advisory opinions to be ratified or rejected by the trial judge. Their verdicts represent conclusive findings (subject only to narrowly tailored standards of review) as to both the facts in



dispute and the application of the law to the facts. Juries are not allowed to abdicate their role to the judge by entering findings on some, but not all, of the issues and leaving the final determination of guilt to the judge. If juries were allowed to render partial verdicts and request that the judge fill in the remaining elements, the guarantee of trial by jury would have little meaning and next to no value.

Likewise, judges are not permitted at trial to encroach on the province of the jury by making their own factual findings. This is true whether the judge attempts to make factual findings after a jury has failed to reach a verdict or, as in this case, before the jury is even instructed. Either way, when the judge enters findings of fact, the process of trial by jury has been irreparably changed. The defendant may have been convicted, but not by a jury.

If we are willing to label as harmless the constitutional error that occurred in this case, we will be endorsing a view of criminal justice where the ends justify the means. As a nation, we pride ourselves on the system by which justice is delivered. We have always assumed that our criminal justice process -- where grand juries indict, prosecutors present evidence, judges charge on the law, and juries determine guilt -- involves a delicate balance of power, designed to protect the individual criminal defendant and the community at large from the enormous power of government. It is the very framework of our system that provides its protections. This Court reached that conclusion in *Fulminante*, where it held that constitutional errors that threaten the framework of the criminal trial are never harmless.

The trial court in this case rewrote the rules for Petitioner's criminal trial, casting itself as the fact-finder in place of the jury. Judges cannot be allowed to recast their role in this way. A reallocation of power between judge and

jury upsets the framework within which justice is dispensed, which, according to *Fulminante*, can never be harmless.

### B. A Rule That a Judge's Decision Effectively to Direct a Verdict on an Element of a Criminal Offense Can Never Be Harmless Error Flows Naturally From This Court's Decision in *Sullivan v. Louisiana*.

This Court has already held that it cannot be harmless error when a trial court instructs a jury in a way that results in the jury returning a defective verdict of guilt. *Sullivan v. Louisiana*, 508 U.S. 275 (1993), held that a constitutionally defective reasonable doubt instruction was structural error, which can never be harmless. *Id.* at 281. If it is never harmless to give an erroneous jury instruction on reasonable doubt because of the threat that the resulting jury verdict may not comply with the guarantees of Due Process and the right to a jury trial, then it follows that it is never harmless for a trial court to direct a verdict on one or more elements of the crime charged, allowing the jury to deliberate only on what the trial court has not already resolved. Both errors not only deprive the defendant of his constitutional rights, but they also undermine the framework within which criminal trials must proceed.

In *Sullivan*, the state court trial judge gave the jury an unconstitutional instruction on reasonable doubt. 508 U.S. at 277. On direct appeal, the Supreme Court of Louisiana upheld the conviction, finding that the unconstitutional instruction had been harmless error. *Id.* This Court disagreed in a unanimous opinion, reversed Sullivan's conviction, and remanded the case for a new trial. *Id.* at 282. The Court reasoned that the right to trial by jury is fundamental to the American scheme of justice and that it includes, as its most



important element, the right to have the jury decide the issue of the defendant's guilt. *Id.* at 277. The Court began with the premise that the prosecution bears the burden of proving each element of the crime charged beyond a reasonable doubt, *id.* at 277-78, and that an erroneous reasonable doubt instruction violated the defendant's constitutional rights. The only issue was whether that error could properly be reviewed under a harmless error standard. The Court held that because of the judge's erroneous instruction, the jury had not rendered a verdict of guilt beyond a reasonable doubt, and "the entire premise of Chapman review is simply absent." *Id.* at 280.

> There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless.

*Id.* The most an appellate court reviewing the verdict could hope to conclude would be that the jury would have found the defendant guilty beyond a reasonable doubt if it had been instructed properly. But this sort of speculation does not support a finding that the constitutional error was harmless, because the wrong entity -- an appellate court -- would ultimately have adjudged the defendant guilty.

> The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.

*Id.*

*Sullivan* firmly establishes that the defendant's right to a jury verdict of guilt beyond a reasonable doubt is a basic protection "whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function" and that the deprivation of that right

"unquestionably qualifies as 'structural error.'" *Id.* at 281-82. The constitutional error committed by the trial court below is no different. The error deprived Petitioner of his right to have the jury determine whether the prosecution had proven *every element* of his crime. For the same reasons underlying the Court's opinion in *Sullivan*, the constitutional error that indisputably occurred in this case qualifies as structural error and cannot be subject to harmless error review. This Court should not hesitate to extend its holding in *Sullivan* to cases where the judge has effectively directed a verdict of guilt as to an element of the crime charged, thereby preventing the jury from reaching a valid determination of guilt.

## III. ALLOWING REVIEW FOR HARMLESS ERROR IN CASES WHERE A COURT HAS EFFECTIVELY DIRECTED A VERDICT OF GUILT ON AN ELEMENT OF A CRIMINAL OFFENSE WILL INVARIABLY ERODE THE CONSTITUTIONAL GUARANTEE OF A JURY TRIAL.

In deciding that certain constitutional errors are never harmless, and are therefore immune from harmless error review, this Court has created bright lines to guide appellate review of both state and federal convictions. Bright line rules are necessary in this context to ensure consistent application of constitutional protections and to prevent courts from administering justice in a manner that is dependent on the vagaries of a particular case. There may be cases where, for example, denial of a convicted defendant's right to counsel would seem to have had no effect on the outcome because even the best defense lawyer in the country could not have convinced a jury to acquit. But this Court does not allow that



kind of *post facto* review in cases where a defendant was not given his right to counsel because to do so would gradually erode the constitutional guarantees that are at the heart of our criminal justice system -- guarantees on which the structure of our system is built.

The same bright line rule previously articulated by this Court that prevents harmless error review of structural errors is necessary in this case. Here, the district court effectively granted a directed verdict in favor of the prosecution on the element of materiality, thereby completely removing that element from the jury's consideration of Petitioner's alleged tax fraud. In any given case, an appellate court might conclude on review of such a conviction that directing a verdict in this fashion was in fact harmless because no reasonable juror could possibly disagree with the trial judge's determination. This kind of *post facto* review for harmless error, however, would allow appellate courts to pick and choose which convictions should be reversed without any guiding principles. Moreover, a court's characterization of an element as "undisputed" should not be allowed to bring errors that are otherwise structural within the universe of harmless error review. When a criminal defendant pleads not guilty, he disputes every element of the crime charged. This is his constitutional right, regardless of the nature of the evidence against him. The fact that a defendant does not affirmatively dispute the existence of a particular element of a crime is legally irrelevant.

Here, Petitioner's conviction was upheld when the trial court directed a verdict on only *one* of the elements of the crime charged, because that error was deemed to be harmless. If this Court condones such an approach, nothing would prevent the same outcome in cases where a trial court directs a verdict on substantially all or perhaps even all elements of the crime charged. If review for harmless error is permitted in

cases where one element has been removed from the jury's consideration, there will be no principled reason to stop there. Inevitably, a defendant's constitutional right to have a jury, and not a judge, decide his guilt would be gradually diminished as judges increasingly co-opted the jury's role.

There is only one way for this Court to prevent the erosion of constitutional protections that the lower court's holding invites and that is to announce a bright line rule that errors that remove an element of a criminal offense from the consideration of the jury can never be deemed harmless. The right to have a jury decide whether the prosecution has met its burden as to each and every element of an indictment is no less fundamental than the right to counsel, the right to an unbiased judge, or the right to a proper instruction on the reasonable doubt standard.



## CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Eleventh Circuit with respect to its holding that the trial court's directed verdict on materiality is subject to review for harmless error and should remand the case for a new trial.

Respectfully submitted,

LISA KEMLER
*Of Counsel*
National Association of Criminal Defense Lawyers
108 North Alfred Street
Alexandria, VA 22314
(703) 684-8000

ROGER W. YOERGES
*Counsel of Record*
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

*Counsel for Amicus Curiae*
National Association of Criminal Defense Lawyers

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